

MEMORANDUM

State of Alaska
Department of Law

TO:	Members, State Board of Education and Early Development	DATE:	November 3, 2021
THRU:	Michael Johnson, Commissioner Department of Education and Early Development	FILE NO.:	JU2015200003
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		SUBJECT:	Attorney General's Report

This memorandum describes the status of current litigation involving the Department of Education and Early Development.

1. *DEC Enforcement Matter related to Contamination at Joe Parent Vocational Education Center in Aniak.* The Alaska Department of Environmental Conservation (DEC) identified DEED, DOT&PF, and the Kuspuk School District, as well as the federal government, AT&T Alascom, Lockheed Martin Corporation, and Exelis-Arctic Services, Inc., as potentially responsible parties (PRPs) for polychlorinated biphenyls (PCBs) and trichloroethylene (TCE) contamination at the site of the Aniak Middle School. The contamination dates back to the use of the site by the U.S. Air Force as a White Alice Communications System site from 1958 to 1979.

At a mediation in 2013, the PRPs agreed to the allocations (percentages of responsibility) that each party would bear in an agreement to share past and future clean-up costs for PCB and TCE contamination, although not all issues relating to TCE contamination could be resolved. In 2015, the PRPs executed an agreement (which remains in effect) to maintain the sub-slab-depressurization system and the TCE monitoring program at the site.

In 2016, Consent Decree (a settlement agreement in the form of a court order) was fully executed. In 2017, DOT&PF retained contractors who conducted PCB clean-up work. The TCE remedial investigation report was issued in 2018, and the TCE feasibility study was approved by DEC in 2019. The feasibility study includes a recommended alternative for addressing TCE at the site. DEC has also requested the drilling of another monitoring well to assess the underground movement of TCE.

Kuspuk School District plans to discontinue its use of the building by January 31, 2022. DOT&PF has funding to demolish the building. The parties must still resolve the allocation of responsibility for PCBs that may exist under the building slab, the cleanup costs for TCE, and the administrative costs of DEC.

2(a). *Illuminations Childcare and Educational Center (Illuminations) Appeal of Department Action taken under Child and Adult Care Food Program (CACFP). Appeal within Department.* In 2015, Illuminations submitted a request for an administrative review of the department's notice suspending the participation of Illuminations in the CACFP program, proposing to terminate Illumination's agreement, proposing to disqualify Illuminations, and proposing to disqualify its owner and administrator. This notice, required under CACFP federal regulations, was sent because of action taken by the state Child Care Program Office to suspend the child care license of Illuminations based on serious health or safety violations. A review official issued a determination upholding DEED's action.

2(b). *Illuminations, LLC, d/b/a Illuminations Childcare and Educational Center, Brenda J. Fuller, and Kimberly J. Danford v. Alaska Department of Education and Early Development. Appeal to court.* In 2015, Illuminations, *et al.*, filed an appeal and their opening brief in the superior court. Appellants had agreed to the postponement of any responsive brief by the department. Appellants have finally agreed to dismiss the case. A stipulation and proposed order for dismissal were filed on October 28, 2021. The final remaining action in this case will be the signing of the order by the court.

3. *Coalition for Education Equity v. Governor Dunleavy and Commissioner Johnson.* The Coalition for Education Equity (CEE) sued Governor Dunleavy and Commissioner Johnson, seeking an order declaring that the distribution on June 10, 2019, of the fiscal year 2019 \$20 million education appropriation (outside the foundation formula), violated Alaska law. The parties agreed that the case should be decided on briefing. On May 21, 2021, the court granted the State's motion for summary judgment, concluding that in the absence of a distribution date or schedule set by the legislature, the Governor and DEED had the statutory and constitutional power to determine the timing for distribution of the subject funds. Because the school districts received the funds before the end of the fiscal year, as appropriated by the legislature, the June 10, 2019 distribution did not violate Alaska law. The court entered final judgment in favor of the Governor and Commissioner Johnson on August 6, 2021. CEE did not file a timely appeal. AAG Jessica Leeah in the Special Litigation Section is responsible for this litigation.

4. *Alaska Legislative Council, on behalf of the Alaska Legislature v. Governor Dunleavy, Commissioner Tshibaka, and Commissioner Johnson.* On July 16, 2019, the Alaska Legislative Council on behalf of the legislature filed suit in superior court against Governor Dunleavy, Department of Administration Commissioner Tshibaka, and

Commissioner Johnson, in their official capacities. The Council alleged in its complaint that the defendants failed to disburse the funds appropriated by the legislature in 2018 to public school districts for fiscal year 2020. The Attorney General issued a formal opinion prior to the lawsuit, concluding that the legislature's 2018 appropriation was unconstitutional because it sought to commit future revenues not on hand in the state treasury in fiscal year 2019, and a new appropriation was needed. The legislature did not pass a new appropriation.

On July 16, 2019, based on the parties' joint motion, the court entered an order requiring that the education funds be disbursed while the lawsuit proceeds. After oral argument on the parties' cross motions for summary judgment, the superior court ruled in favor of the Council, holding that forward appropriations do not violate the Alaska Constitution. Defendants appealed this decision and briefing is complete. The court held oral argument on March 31, 2021, and the case is pending a decision from the Alaska Supreme Court. Senior AAG Laura Fox in the Opinions, Appeals, & Ethics Section is handling the appeal.

5. In the matter of Alaska Department of Education and Early Development Predetermination Proceeding. On March 3, 2021, the Department submitted to the U.S. Department of Education (US-Ed) its disparity test along with attachments and formal notice, in accord with 20 USC 7009(c)(1)(A), that it intended to consider federal Impact Aid payments when allocating state aid to school districts. The disparity test measures the disparity among state aid revenues available to the school districts in the state. In order for the state to consider federal impact aid payments (and reduce state aid accordingly) there can be no more than 25% disparity among school districts, discounting the highest and lowest 5%. US-Ed recently requested for the first time that DEED include transportation costs in its disparity test submission.

US-Ed held a telephonic predetermination hearing on June 8, 2021. The department filed a written response to the issues raised by US-Ed at the hearing on June 24, 2021, arguing that transportation costs should not be included in the state's disparity test. On June 30, 2021, US-Ed distributed its decision concluding that Alaska does not meet the disparity test federal requirements and that, as a result, the state is not eligible to consider a portion of impact aid payments as local resources in determining state aid entitlements for the period of July 1, 2021 through June 30, 2022. DEED requested a hearing on this decision on August 27, 2021, and the matter was assigned to an administrative law judge and briefing ordered. On October 22, 2021, DEED and US-Ed filed a joint motion for a stay of the proceeding to allow DEED to submit revised state data to US-Ed for review and analysis of whether it meets the disparity test requirements.